STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LENWARD HAMPTON,

Defendant-Appellant.

UNPUBLISHED
November 16, 1999

No. 211807
Recorder's Court
LC No. 97-000792

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty to forty years' imprisonment. Defendant appeals as of right. We affirm.

I

Following his arrest, defendant made a statement to police officers, detailing his involvement with the victim in the motel room where her body was discovered, and implicating him in the murder. In a pretrial *Walker*[1] hearing, the trial judge denied defendant's motion to suppress the statement. The trial court found that defendant understood his rights under *Miranda*,[2] and the statement was freely and voluntarily given. On appeal, defendant first argues that the trial court erred in admitting the statement. We disagree.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999). If an accused validly waives his Fifth Amendment rights, the police may continue questioning him until and unless he clearly requests an attorney. *Davis v United States*, 512 US 452, 459-460; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995).

Defendant was interviewed by Detroit Police Lieutenant Billy Jackson and Sergeant Laverne Gallant. Jackson testified that he met with defendant in a squad room the morning following defendant's

arrest. Gallant was also present, sitting about eight feet away. Defendant read aloud, initialed, and signed a certificate of notification which apprised him of his constitutional rights. Following Jackson's initial questioning, defendant was interviewed by Gallant, who took defendant's statement. Defendant never asked to stop the interview, nor requested an attorney.

Defendant argues that, because the questioning by Gallant took place in an area entirely different from the questioning by Jackson, it constituted a separate interrogation, and defendant should have been given a fresh set of *Miranda* warnings before Gallant's interview. The cases cited by defendant to support his argument all involved situations in which a second set of warnings was necessitated by facts not present in this case and, therefore, are inapplicable.

In this case, both officers were present when defendant was given *Miranda* warnings, and there was no break or change of location when Jackson finished interviewing defendant and Gallant took over. Defendant signed and initialed the constitutional rights notification which informed him that he could decline to make a statement at any time. He read, signed, and initialed the notification in the presence of both officers. Questioning does not appear to have taken place for a period longer than two hours – perhaps even less – and without any significant breaks between the time Jackson finished questioning defendant and Gallant began. Reading defendant his *Miranda* warnings and the questioning by the two officers appears to have been part of a single, continuous transaction, making further warnings unnecessary. We do not believe that it was "reasonable to expect a rewarning of those rights" when Gallant began his interview. *People v Ray*, 431 Mich 260, 277; 430 NW2d 626 (1988).

Defendant also asserts that his statement was involuntary and, therefore, inadmissible because it was the product of trickery. Defendant cites nothing in the record to indicate that the officers tricked or deceived him into making his statement. Defendant was told that the purpose of the interview was to allow him to give his version of the facts. The trial court did not err in denying defendant's motion to suppress.

II

Defendant next argues that the prosecutor engaged in prosecutorial misconduct, which requires reversal of his conviction. Because defendant failed to object to the prosecutor's conduct at trial, appellate review is precluded absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). We find no miscarriage of justice.

The prosecutor made the following comments during his closing argument to the jury:

> Now, before we began the trial, in that voir dire process and in opening statements, we talked about several different concepts in the law, which I just want to touch on real quickly, because they're very, very important.

> Those are the burden of proof. And, it was indicated to you that the burden of proof in this case is beyond a reasonable doubt. And I want to reiterate for you that that's nothing unique in this case.
>
> In fact, it's the same burden of proof that's used in every criminal case and all the thirty-five other courtrooms in this building, which there's jury trials probably going on in twenty of them right now; and in every criminal case across the nation, that is the burden of proof. People are found guilty all the time with the use of that burden of proof.
>
> The second concept that I want to reiterate for you is the presumption of innocence. That is, when this trial began, Mr. Hampton was presumed innocent until the evidence built against him. And in a moment when you go back there and you talk about how that evidence all fits together, that presumption will be shed, because it's not a factual presumption of innocence. And what I mean by that, is when he's presumed to be innocent, it's not factual innocence, it's just a presumption that we begin the trial with. And then at the end of the trial, should be removed for him, from him, if you believe he is, in fact, the one who committed this murder.

Defendant argues in conclusory fashion that the prosecutor's statement, that defendants are convicted under the "beyond a reasonable doubt" standard "all the time," was clearly "improper" and "prejudicial." Even assuming that the comments suggested that the "beyond the reasonable doubt" standard is readily met, the prosecutor's comments were not so prejudicial that they could not have been cured by an instruction to the jury.

Defendant next complains that the prosecutor's comments regarding the presumption of innocence were improper. The statement closely tracks the language of CJI2d 3.2(1), which provides:

> A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

To the extent that the prosecutor's comments vary from this language, the variances are minor, and again, any possible prejudice could have been cured by a cautionary instruction.

Additionally, during rebuttal argument, the prosecutor stated, "[the victim] was dead when [defendant] left, he killed her and he tried to get away with it. Don't let him get away with it, ladies and gentlemen. Thank you." Defendant argues that the prosecution's comment was improper because it suggested to the jurors that if they did not convict defendant, they would be setting a guilty person free. Defendant's argument is without merit because a prosecutor may properly argue from the evidence that the defendant should be found guilty. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

In any event, to the degree that the prosecutor's comments were overzealous, they were again capable of being cured by an instruction to the jury.

III

Defendant's final argument is that his sentence of twenty to forty years' imprisonment was disproportionate, particularly in light of the twenty year minimum sentence. Defendant asserts that his sentence does not reflect the proper balance between society's need for protection and the maximization of his rehabilitative potential.

The proportionality of a sentence is reviewed under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 634; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). A sentence must be proportionate to the seriousness of the offense and the defendant's prior record. *Id*. Sentences that are within the range provided by the guidelines are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Nevertheless, a sentence within a guideline range can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 661. A defendant's employment, lack of criminal history and minimum culpability are not unusual circumstances which overcome the presumption, however. *Daniel*, *supra* at 54.

Here, defendant's twenty-year minimum sentence was within the guidelines' recommended minimum sentence range of ninety-six to three hundred months. Because a person's employment, lack of criminal history, and minimum culpability are not unusual circumstances which overcome the presumption of proportionality, *Daniel*, *supra* at 54, defendant's argument must rest on the claim that he is capable of rehabilitation. Indeed, the trial judge recognized defendant's church background and that he was not the "typical defendant who usually is before this bench."

The trial court considered defendant's work background and the fact that he had no previous encounters with the criminal justice system. The trial court could have imposed a twenty-five year minimum sentence under the guidelines, but instead chose a lower minimum sentence. Defendant's sentence was within the guidelines' recommended sentence range, and without a showing of unusual circumstances that the trial court failed to consider, defendant fails to overcome the presumption of proportionality. The trial court did not abuse its discretion in imposing a twenty- to forty-year sentence.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).